

☐ EXPEDITE  
☐ No Hearing is Set  
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Date:

Time:

**STATE OF WASHINGTON  
THURSTON COUNTY SUPERIOR COURT**

LOWER ELWHA KLALLAM TRIBE  
a federally-recognized Indian Tribe,  
CARMEN WATSON-CHARLES,  
ARLENE WHEELER, and ARNOLD  
"ROBERT" ELOFSON, individually  
and on behalf of all others similarly  
situated,

Plaintiffs,

v.

THE STATE OF WASHINGTON,  
acting through its WASHINGTON  
STATE DEPARTMENT OF  
TRANSPORTATION and  
WASHINGTON STATE  
DEPARTMENT OF ARCHAEOLOGY  
AND HISTORIC PRESERVATION,  
formerly known as Washington State  
Office of Archaeology and Historic  
Preservation; DOUGLAS B.  
MCDONALD [sic], in his official  
capacity as the Secretary of  
Transportation, Washington State  
Department of Transportation;  
ALLYSON BROOKS, in her official  
capacity as the State Historic  
Preservation Officer, Washington State  
Department of Archaeology and  
Historic Preservation; PETER KIEWIT  
SONS, INC., a Delaware Corporation;  
KIEWIT PACIFIC CO., a Delaware  
Corporation and subsidiary of Peter  
Kiewit Sons, Inc.; GENERAL

NO. 05-2-01595-8

STATE DEFENDANTS'  
ANSWER, COUNTERCLAIMS, AND  
THIRD-PARTY COMPLAINT

**STATE DEFENDANTS'  
ANSWER, COUNTERCLAIMS, AND  
THIRD-PARTY COMPLAINT**

1 CONSTRUCTION CO., a Delaware  
2 corporation and subsidiary of Peter  
3 Kiewit Sons, Inc.; JONATHAN  
4 SHOTWELL CORPORATION, a  
5 Washington Corporation; FIELDS  
6 SHOTWELL CORPORATION, a  
7 Washington corporation; PLATINUM  
8 C LIMITED PARTNERSHIP, a  
9 Washington Limited Partnership; and  
10 JOHN DOES I through X,

Defendants,

v.

11 FRANCES CHARLES, Chair of the  
12 Lower Elwha Klallam Tribe, in her  
13 official capacity; and JOHN DOES 1-  
14 100,

Third Party  
Defendants.

## 15 I. ANSWER

16 Defendants State of Washington, Douglas MacDonald, and Allyson Brooks in their  
17 official capacities ("State Defendants") through their attorneys, Rob McKenna, Attorney  
18 General of Washington, and Alan Copsey, Steve Dietrich, and Doug Shaftel, Assistant  
19 Attorneys General, answer the numbered paragraphs in the complaint as follows:

### 20 ANSWER TO INTRODUCTORY ALLEGATIONS

21 The arrangement of the "introductory" allegations in the Plaintiffs' complaint renders a  
22 traditional response difficult. Accordingly, the State Defendants provide a two-part answer  
23 consisting of a general answer to the substance of the allegations in the section and more  
24 specific answers to specific allegations in the numbered paragraphs.

#### 25 General Answer to Paragraphs 1.1 to 1.10:

26 The State Defendants admit only that the Hood Canal Bridge Rehabilitation Project and  
Graving Dock Program ("the Project") is a federal undertaking, which is required to comply  
with §106 of the National Historic Preservation Act of 1966, 16 U.S.C. §470. Federal

1 regulations that implement the statute (36 CFR Part 800) required that the lead federal agency  
2 for the Project, the Federal Highway Administration ("FHWA"), take into account whether the  
3 Project would affect historic properties. The FHWA §106 review process for the Project was  
4 formally initiated on July 26, 2000, before the Port Angeles site had been identified as a  
5 potential graving dock location. After the Port Angeles site was identified as a potential  
6 graving yard site in November 2002, the §106 process expanded to include potential historical  
7 properties associated with that site and to involve the Lower Elwha Klallam Tribe ("LEKT"  
8 and "Tribe") in the required consultation process. In addition to the Tribe, FHWA and the  
9 Washington State Department of Transportation ("WSDOT"), other significant participants in  
10 the graving yard §106 consultation process included the State Historic Preservation Officer  
11 ("SHPO") and the United States Army Corps of Engineers, which was required to issue a  
12 federal permit for the graving yard construction. As the project proponent, WSDOT was  
13 required to provide information about the identity of affected historic properties and describe  
14 any Project effects on the identified properties.

15 **Pre-construction §106 process to review project impacts on historical properties**

16 On October 21, 2002, WSDOT sent a letter to the Tribe initiating formal §106  
17 consultation as required under the federal regulations. The letter advised the Tribe of the  
18 proposed graving dock project and requested a response from the Tribe to acknowledge its  
19 interest in participating as a consulting party and to identify key tribal contacts.

20 On that same date, WSDOT contracted with a professional consulting firm, Western  
21 Shores Heritage Services ("WSHS") to "conduct a cultural resources investigation to satisfy  
22 regulatory compliance with the National Historic Preservation Act." The tasks assigned to  
23 WSHS included preparation of a cultural resources survey to evaluate the likelihood that the  
24 Project would affect any property eligible for inclusion on the National Register of Historic  
25 Places ("NRHP"). To gather information for the survey, WSHS was required to determine the  
26 extent of proposed Project activities, review available literature and scientific data, conduct a

1 field investigation, and consult with affected tribes. WSHS issued the initial Cultural  
2 Resources Survey on December 10, 2002, and a revised version on January 6, 2003.

3 Although the report that WSHS prepared following its cultural resources assessment  
4 noted that Tse-whit-zen and its cemetery was located in the general vicinity of the Project, it  
5 found no evidence of significant prehistoric or historic archaeological resources within the  
6 Project boundaries and concluded that no NRHP-eligible historic properties would be affected  
7 by the Project. WSHS recommended a monitoring plan to address the “unlikely event that  
8 ground-disturbing or other construction activities result in the inadvertent discovery of  
9 archaeological resources.” WSHS’s report further advised that in the “unlikely event of the  
10 inadvertent discovery of human remains, work should be halted in the area, the discovery  
11 secured against further disturbance and immediate contact established with the appropriate law  
12 enforcement, the office of the Washington SHPO and authorized tribal representatives.”

13 As part of the §106 consultation process, on January 13, 2003, WSDOT provided a  
14 copy of WSHS’s cultural resources survey to the LEKT for review and comment. In a letter  
15 dated February 5, 2003, Mr. Dennis Sullivan, Tribal Chair, wrote that “[o]ur staff has reviewed  
16 this document and basically agrees with its findings.” The Tribe’s letter pointed out that  
17 known Klallam village sites were nearby, but did not say that the Project would affect any  
18 known historic properties. The Tribe concurred with WSHS’s recommendation that an  
19 appropriate monitoring plan should be developed to address the unanticipated discovery of  
20 such resources. The Tribe’s letter did not disclose that, as the Tribe now alleges, it “did not  
21 have a cultural resources department or an archaeologist on staff.” Indeed, on February 4,  
22 2003, the Tribe identified its environmental planner, Mr. Matt Beirne, as the tribal contact for  
23 the Project.

24 WSHS completed the Archaeological Monitoring Plan for the Project on April 4, 2003.  
25 The Monitoring Plan provided more detailed protocols for WSDOT to follow in the event that  
26 cultural or historical artifacts or human remains were unintentionally uncovered. WSDOT

1 provided a copy of the plan to the Tribe and again solicited comments. The Tribe provided no  
2 comments about the Monitoring Plan.

3 At no time during the pre-construction phase of the §106 consultation process did the  
4 Tribe notify the State Defendants that burials or a buried ancestral village likely would be  
5 affected by the Project. To the contrary, in June 2003, the Tribe provided the SHPO with an  
6 analysis entitled "Report on the Location of the Village Tse Whit Zen Based on an Analysis of  
7 the 1853 Map of False Dungeness Harbor by the U.S. Coast Survey." In that report, the Tribe  
8 concluded that "[t]here does not appear to be a conflict [between the WSDOT graving yard  
9 project and the village site] based on the methods of locating the village described above."

10 Although Chairman Sullivan told a newspaper reporter in May 2005 that "I didn't reach  
11 out to as many [of the elders] as I wanted to. This bothers me. It's been a very expensive  
12 learning process for us all," he never indicated to the State Defendants in 2003 that he had  
13 failed to consult with the tribal elders or that the tribal elders might have relevant information.  
14 Relying on WSHS's professional judgment, as well as the Tribe's representations, WSDOT  
15 reasonably believed that the Project would not adversely affect any historical properties.  
16 Based in large part on that belief, the Port Angeles site remained under consideration for  
17 selection as the Project site. After the §106 process was completed and other permits obtained,  
18 WSDOT selected the Port Angeles site, purchased the necessary property and the construction  
19 contractor broke ground for the Project on August 6, 2003.

20 **The first discovery at the site**

21 On August 16, 2003, during the early of phase of construction activities, WSDOT  
22 contractors unearthed processed shellfish and mammal remains indicative of past Native  
23 American presence. WSDOT immediately terminated construction activity in the area and  
24 notified the FHWA, the Tribe, the State Historic Preservation Officer and all other appropriate  
25 authorities pursuant to the approved monitoring plan. Almost immediately, the Tribe retained  
26 its own archaeology firm, Larson Anthropological and Archaeological Services, Ltd.,

1 (“LAAS”), to represent the Tribe’s articulated interests at the site and to monitor WSDOT’s  
2 compliance with the monitoring plan. Work on the site continued pursuant to the monitoring  
3 plan and in accordance with the Tribe’s spiritual requirements until August 26, 2003, when  
4 WSDOT ordered a work stoppage pending completion of additional archaeological  
5 investigation. The small number of fragmentary human remains that had been uncovered by  
6 that time were transferred to the Tribe. On August 29, 2003, WSDOT authorized payment to  
7 the LEKT of up to \$80,000 to reimburse the Tribe for its archaeological expenses until a  
8 formal agreement could be executed. During this time frame, Chairman Sullivan repeatedly  
9 stated that the Tribe supported the Project and did not wish to force the Project to move  
10 elsewhere.

11 **Post-discovery §106 process**

12 As required by §106, on September 18, 2003, the Tribe and WSDOT executed an  
13 Archaeological Assessment Plan, with the assistance of WSHS and LAAS. At the Tribe’s  
14 urging, the Plan contemplated relatively little trenching of undisturbed soils to avoid disturbing  
15 any underground human remains. During this “reassessment” process, the Tribe did not  
16 suggest and the Assessment Plan did not indicate that the Project site was the location of a  
17 formal burial ground or that significant numbers of human remains would be uncovered.  
18 However, the Assessment Plan included a specific protocol for treating any uncovered human  
19 remains or funerary objects. Immediately after executing the Assessment Plan, Tribal Chair  
20 Sullivan said in a newspaper article dated September 19, 2003, “We are very pleased. It was a  
21 very professional and productive process and the agreement will protect our interests.”  
22 Then-Tribal Council Secretary-Treasurer, Frances Charles, said, in the same article, “I believe  
23 both parties are pleased with the agreement. It addresses the concerns of DOT and the tribe.”  
24 Tribal officials again said that they never intended to delay the Project. WSDOT relied on  
25 these statements and the Tribe’s satisfaction with the Assessment Plan when it made the  
26 decision to proceed with work at the site.

1 WSHS, in consultation with the Tribe and LAAS, completed field work for the  
2 reassessment by October 2003. According to Ms. Frances Charles, in a newspaper article  
3 dated September 24, 2003, "[t]here have been some findings, and the assessment plan has been  
4 followed with great sensitivity. We appreciate the workers for their care of the land which has  
5 been identified as an old village. When items are found, everyone works as a team and makes  
6 sure things are handled in a way the tribe is comfortable with." As a result of the information  
7 gathered during the reassessment process, WSHS determined that the site was eligible for the  
8 National Register of Historic Places. WSDOT endorsed the determination and the SHPO  
9 concurred. Despite extensive tribal participation, the Archaeological Assessment Plan did not  
10 find significant human remains within the Project area.

11 Nonetheless, once it was known that the site was eligible for placement on the registry,  
12 §106 required that the FHWA evaluate the adverse effects of the Project upon the historical  
13 property. Negotiations between the FHWA, the Corps of Engineers and the consulting parties  
14 (WSDOT, SHPO and LEKT) began and were designed to lead to the creation of three primary  
15 documents governing the archaeological issues associated with the site. While those  
16 negotiations were ongoing, WSDOT and the LEKT negotiated a separate Archaeological  
17 Testing and Monitoring Plan for Bioswales and Drainage dated November 6, 2003, which  
18 allowed some necessary interim construction work to take place pending completion of the  
19 three primary documents. After signing the Bioswale and Drainage plan, Tribal Chair Sullivan  
20 announced in a news release that "[o]ur agreements with WSDOT protect tribal interests and  
21 allow DOT to begin some work on the site." At this same time, Ms. Charles said that the Tribe  
22 never intended to delay the project and was committed to seeing construction restart in Port  
23 Angeles because of the positive economic impact and the knowledge that the bridge needs to  
24 be replaced.

25 The first primary document designed to provide a precise plan for mitigating adverse  
26 Project effects on the historical site is called the Site Treatment Plan. Originally, WSDOT had

1 intended to use its consultant, WSHS, to prepare the Site Treatment Plan. After WSHS  
2 completed several months of work on the Site Treatment Plan, WSDOT delegated completion  
3 of the Site Treatment Plan to LAAS, the Tribe's archaeological consultant. This change in  
4 archaeological firms was made at the Tribe's request after the Tribe questioned WSHS'  
5 competence and previous work at the site.

6 Ultimately the parties negotiated a mutually acceptable Site Treatment Plan which was  
7 incorporated into a §106 Memorandum of Agreement ("MOA") signed by the federal agencies,  
8 the State Defendants, and the Tribe. Prepared with extensive tribal involvement by the Tribe's  
9 archaeologist, the Site Treatment Plan did not contemplate that the project would encounter a  
10 cemetery or that the recovery of significant intact human remains would become necessary.  
11 The Site Treatment Plan reaffirmed the adequacy of the existing protocols for the unanticipated  
12 discovery of human remains. It required that each excavation machine be monitored by a  
13 LAAS field archaeologist as well as a LEKT representative. The Plan stated that the Tribe was  
14 responsible for contacting appropriate spiritual workers, conducting necessary ceremonies, and  
15 providing for the temporary storage of uncovered human remains. In addition to  
16 Mr. Sullivan's acknowledged failure to consult tribal elders during the initial consultation  
17 process, Ms. Charles has since said that the Tribe once again erred by failing to involve tribal  
18 elders when she purportedly told the Seattle Times that she was "sorry that the [Tribal] Council  
19 hadn't spent the time and reached out to the Elders at the time that this was being considered."  
20 The State Defendants relied on the Tribe to consult with its elders as it was uniquely positioned  
21 to identify and communicate with these people.

22 The MOA is the second primary document. The MOA is a contract that defines the  
23 appropriate measures needed to mitigate the adverse Project effects on the historical property,  
24 including the uncovering and reburial of human remains, if any were found. By signing the  
25 MOA on March 16, 2004, the Tribe agreed that the mitigation measures described in that  
26 document and the incorporated Site Treatment Plan constituted "appropriate mitigation



1 measures to address the adverse effects . . . to include archaeological data recovery, curation of  
2 recovered artifacts and site records [and] reburial of disturbed ancestral remains . . . .” The  
3 MOA resolved all §106 issues between the parties and defined each party’s rights and  
4 obligations. The MOA contains a disputes resolution provision that requires the parties to  
5 submit disputes regarding activity covered by the MOA to the FHWA for resolution. The  
6 LEKT has accepted the benefits provided by the MOA by, among other things, allowing  
7 WSDOT to pay substantial sums for data recovery, accepting reimbursement for project  
8 support and by invoking the disputes resolution clause. WSDOT relied on the Tribe’s  
9 representation that the MOA and Site Treatment Plan satisfied all §106 issues when it decided  
10 to proceed with work at the site.

11 All remaining tribal legal claims regarding the Project’s effects on tribal interests were  
12 resolved in a third primary document entitled Settlement Agreement and Release, dated  
13 March 16, 2004. The FHWA did not sign the Settlement Agreement and Release because the  
14 federal agency had determined that the agreement provided for mitigation that exceeded the  
15 legal requirements of §106. Accordingly, to resolve all of the Tribe’s extra-§106 claims and to  
16 ensure that the Project could proceed, WSDOT agreed to pay \$3.437 million of additional  
17 mitigation funds. In return, the Tribe agreed to “compromise and settle all claims between [it  
18 and the State] for damages or equitable relief which have occurred or may occur as a result of  
19 the excavation and construction activity at the site.” The Tribe further promised to release and  
20 forever discharge any claims or causes of action that it had or could have against the State and  
21 promised not to sue the State or its contractors or agents “on account of any damage loss or  
22 injury sustained as a consequence of graving dock construction activity.” The Settlement  
23 Agreement and Release is a valid and enforceable contract. The LEKT has accepted the  
24 benefits of that contract by, among other things, accepting the \$3.437 million, which was  
25 intended to fund the Tribes’ perceived need for mitigation beyond that already contained in the  
26 MOA. The Tribe and WSDOT understood that such mitigation requirements included the cost

1 of purchasing additional land for reburial of uncovered human remains, reburial costs, and the  
2 cost of building curation facilities. WSDOT relied on the Tribe's promise that that Settlement  
3 Agreement and Release completely resolved all extra §106 issues when it decided to proceed  
4 with work at the site.

5 **Post-MOA construction and archaeological activity**

6 Construction and archaeological activity at the site resumed in April 2004 and  
7 proceeded according to the terms of the MOA and the Site Treatment Plan. Pursuant to the  
8 Site Treatment Plan and various contracts, the archaeology work was divided between the two  
9 archaeology firms. WSHS worked in the "drainage/bioswale area" and LAAS worked within  
10 the graving dock boundaries. WSHS employed many tribal members to work as field  
11 assistants and to ensure that the agreed-upon human remains recovery protocols were followed.  
12 WSDOT reimbursed WSHS for the cost of these tribal employees in the amount of  
13 \$346,466.59. LAAS subcontracted with the Tribe to provide similar services within its area of  
14 responsibility. WSDOT has paid or agreed to pay \$1,358,256.44 to LAAS or directly to the  
15 Tribe for those services. These payments are over and above the \$3.437 million paid to the  
16 Tribe under the Settlement Agreement and Release. The Site Treatment Plan specified that  
17 Ms. Frances Charles was the LEKT Policy Representative who would "participate in all tasks  
18 identified under the category of archeology [sic] including testing and monitoring, human  
19 remains recovery, data recovery excavation, Shotwell Recycling Property Recovery,  
20 coordination with LAAS, and management of the Tribal crew." The same document identified  
21 Plaintiff Arlene Wheeler as the LEKT Cultural Resources Liaison, who would "participate in  
22 all activities including testing and monitoring, human remains recovery, data extraction,  
23 Shotwell Recycling Property Recovery, and related activities. The Cultural Resources Liaison  
24 will assist the Policy Representative in LEKT coordination and consultation and management  
25 of the Tribal crew."

1 As work proceeded, the Tribe and the archaeologists began to remove human remains  
2 and funerary objects from the site. A newspaper article from May 9, 2004, quotes Ms. Charles  
3 as saying that “[w]e have very good collaboration between all agencies and tribal members at  
4 the site.” She further reported that “all workers have completed safety and cultural and  
5 spiritual sensitivity training.”

6 As the number of recovery of human remains and funerary objects increased, WSDOT  
7 continued extraordinary efforts attempting to comply with tribal wishes as expressed by the  
8 elected tribal leaders. On May 21, 2004, Chairman Sullivan wrote a letter asking the State  
9 Defendants to expand the burial recovery program beyond the areas that would be disturbed by  
10 the ordinary Project construction activity. Although it was not legally obligated to do so,  
11 WSDOT allowed WSHS and tribal assistants to search for and remove some additional burials  
12 in the area outside the Project’s horizontal boundaries but resisted requests to uncover human  
13 remains located below the anticipated depth of the graving dock. In a June 27, 2004  
14 newspaper article, LEKT Chairwoman Frances Charles was quoted as saying that “[w]e do not  
15 want to knowingly leave anyone behind.” The Tribe took the position that the state and federal  
16 agencies were obliged to locate and remove all human remains from the site regardless of  
17 whether the remains were located in the area affected by the Project. Indeed a significant  
18 number of remains were uncovered outside the Project area solely because the Tribe requested  
19 that WSDOT allow such efforts.

20 Ultimately the scope of WSDOT’s duty to uncover remains located outside the Project  
21 area and several other issues were submitted to the FHWA in October 2004 for decision  
22 pursuant to the disputes resolution clause in the MOA. The FHWA issued a ruling on  
23 November 23, 2004, in which it rejected the Tribe’s position that WSDOT was legally required  
24 to remove all remains and FHWA further concluded that the MOA remained valid and in effect  
25 despite the evolving understanding of the site. After this legal setback, on December 10, 2004,  
26 the Tribe sent a letter to WSDOT asking that WSDOT end construction activities at the site.

1 After extensive consultation with the governor's office and elected officials, WSDOT made the  
2 decision not to proceed with the graving dock facility at Port Angeles on December 21, 2004.

3 From the time of ceasing construction at the site in December 2004 until the Tribe sued  
4 the State Defendants in August 2005, there were extensive settlement negotiations conducted  
5 through conference calls, meetings, and the exchange of correspondence between WSDOT, the  
6 Tribe, FHWA, SHPO and the Corps of Engineers. A significant portion of time was spent on  
7 the main issues of reburial of the remains, treatment of the Shotwell material, security at the  
8 site, short and long-term access to the site, ownership of the site, and communication protocols.  
9 The settlement efforts have proven unsuccessful.

10 Contemporaneous with the filing of this lawsuit, and in recognition of the applicability  
11 of the federal §106 process, the Tribe sent a letter to the federal Advisory Council on Historic  
12 Preservation on August 19, 2005, regarding the impasse in settlement negotiations with  
13 WSDOT. The Advisory Council responded on August 29, 2005, reiterating the content of its  
14 prior letter of July 14, 2005, that the FHWA and the Corps of Engineers are responsible for  
15 addressing the effects of the undertaking at the site. The Advisory Council wrote a letter to  
16 FHWA on August 29, 2005, requesting that the federal agency review the terms of the MOA  
17 and inform all those concerned what obligations were remaining under the MOA. As of the  
18 filing of this Answer, FHWA has not informed WSDOT or SHPO of any determination  
19 regarding those outstanding issues.

20 In addition to the general answer above, the State Defendants provide the following  
21 answer to the more specific "introductory" allegations:

22 1.1 The State Defendants admit only that intact or partial remains of several  
23 hundred people have been removed from the site but lack sufficient knowledge to admit or  
24 deny the precise number. Although the State Defendants are unaware of the completion of any  
25 DNA testing or other scientific analysis that would identify the remains and confirm their  
26 direct lineal ancestry, some of the human remains may belong to ancestors of modern day

1 tribal members. Other remains appear to be of people that were not tribal ancestors.  
2 Regardless, the uncovering, removal and storage of all human remains was conducted pursuant  
3 to procedures approved by the LEKT. The protocols were developed by professional  
4 archaeologists in consultation with the LEKT and were specifically designed to honor tribal  
5 cultural and spiritual needs. Tribal leaders observed and supervised the remains removal work,  
6 which was performed by the archaeologists or by tribal members working either for WSHS or  
7 for the Tribe pursuant to subcontracts with LAAS. The Tribe obtained this work by promising  
8 to work better, faster and more sensitively than others and was responsible for providing  
9 suitable and well-trained workers for these tasks. WSDOT relied on the Tribe to competently  
10 remove all remains in a respectful and dignified manner and paid or has agreed to pay the  
11 Tribe or tribal members a total of \$1,704,723.03 for these services. The human remains and  
12 funerary items recovered from the site were delivered to the Tribe and remain in the Tribe's  
13 possession. The remaining archaeological artifacts have been retained for the scientific study  
14 by the consulting archaeologist, as the Tribe agreed to in the MOA. Pursuant to the MOA's  
15 disputes resolution clause, the party's disagreement regarding the obligation to reinter human  
16 remains on the Project site must be submitted to the FHWA for decision. The State  
17 Defendants lack knowledge sufficient to form a belief regarding the truth of the remaining  
18 allegations in this paragraph and therefore deny all remaining allegations not specifically  
19 admitted.

20 1.2 The allegations in this paragraph are largely rhetorical and the State  
21 Defendants deny the allegations in their entirety.

22 1.3 The allegations in this paragraph are largely rhetorical and the State  
23 Defendants deny the allegations.

24 1.4 The allegations in this paragraph are largely rhetorical and the State  
25 Defendants deny the allegations.  
26

1           1.5     The State Defendants admit only that many human remains have been  
2 uncovered and removed from the site along with various artifacts. The remains and artifacts  
3 have been delivered to the Tribe or to LAAS pursuant to the terms of the MOA. The State  
4 Defendants lack knowledge sufficient to form a belief regarding the truth of the remaining  
5 allegations in this paragraph and therefore deny those allegations.

6           1.6     The State Defendants admit only that several thousand cubic feet of rock, sand,  
7 soil, and construction debris from prior industrial fill and development were removed from the  
8 site by its construction contractors and transported to a nearby facility, known as the Shotwell  
9 facility. WSDOT allowed tribal leaders and tribal elders to inspect this material in August  
10 2003. At that time, the Tribe did not indicate that it located evidence of human remains in this  
11 material. The State Defendants lack knowledge sufficient to form a belief regarding the truth  
12 of the remaining allegations in this paragraph and therefore deny those allegations.

13           1.7     The State Defendants admit only that the Tribe has provided cedar boxes for the  
14 human remains removed from the site and that the Tribe is in possession of those remains  
15 pursuant to the MOA. The State Defendants and the Tribe have been unable to negotiate the  
16 legal issues surrounding the potential return of the human remains to the Project site and that  
17 dispute should be resolved pursuant to the disputes resolution provision of the MOA. The  
18 State Defendants deny all allegations not specifically admitted.

19           1.8     The State Defendants admit only that, as reflected in the various agreements and  
20 protocols that have been developed to deal with the unanticipated discovery of the human  
21 remains, the State Defendants respect tribal culture and its traditions regarding treatment of  
22 human remains, which the State Defendants reasonably understood to be embodied in the  
23 protocols and procedures approved by the Tribe. The State Defendants deny all allegations not  
24 specifically admitted.

25           1.9     The allegations in this paragraph are largely rhetorical and the State Defendants  
26 deny them.

1           1.10   The State Defendants admit only that the allegations in this paragraph consist of  
2 a characterization of some of the Tribe's stated governmental interests. Based on the Tribe's  
3 request that the State Defendants conduct all relationships with the Tribe on a government-to-  
4 government basis, the State Defendants relied on the Tribe's representations regarding tribal  
5 cultural and spiritual needs. The State Defendants allege that the tribal leadership was  
6 responsible for using reasonable care to fulfill its role in the §106 process and after the MOA  
7 was executed, owed the State Defendants a duty of good faith and fair dealing. As explained  
8 elsewhere, the Tribe has breached those duties. The State Defendants deny all allegations not  
9 specifically admitted.

10                                   **ANSWER TO "PARTIES" ALLEGATIONS**

11           2.1    The State Defendants admit only that the LEKT is a federally recognized Tribe  
12 and that it is a successor in interest to an entity that signed the Treaty of Point No Point.

13           2.2    The State Defendants lack knowledge sufficient to form a belief regarding the  
14 truth of the allegations in this paragraph and therefore deny those allegations.

15           2.3    The State Defendants admit that the Washington State Department of  
16 Transportation is a state agency with the authority prescribed by Title 47 RCW and other  
17 applicable law.

18           2.4    The State Defendants admit only that Douglas B. MacDonald serves as  
19 WSDOT Secretary and is the agency's chief executive officer.

20           2.5    The State Defendants admit that the Washington State Department of  
21 Archaeology and Historic Preservation is a state agency with the authority prescribed by  
22 Chapter 43.334 RCW and other applicable law. Pursuant to Laws of 2005, Chapter 333  
23 effective July 24, 2005, the Department of Archaeology and Historic Preservation is the  
24 successor agency to the Office of Archaeology and Historic Preservation.

25           2.6    The State Defendants admit the allegations in this paragraph.  
26

1           2.7     The State Defendants admit the allegations in this paragraph upon information  
2 and belief.

3           2.8     The State Defendants admit the allegations in this paragraph upon information  
4 and belief.

5           2.9     The State Defendants lack knowledge sufficient to form a belief regarding the  
6 truth of the allegations in this paragraph and therefore deny those allegations.

7           2.10    The State Defendants lack knowledge sufficient to form a belief regarding the  
8 truth of the allegations in this paragraph and therefore deny those allegations.

9                   **ANSWER TO JURISDICTION AND VENUE ALLEGATIONS**

10          3.1     The State Defendants deny that this court has jurisdiction over any claim  
11 covered by the disputes resolution provision of the MOA. As to any other claims, the State  
12 Defendants admit only that this court has subject matter jurisdiction over such claims that do  
13 not sound in tort.

14          3.2     The State Defendants admit only that the Plaintiffs filed tort claims with the  
15 state's Risk Management Office on or about the date that they filed the complaint. The State  
16 Defendants deny that the Plaintiffs' tort claim filing complies with Chapter 4.92 RCW.

17          3.3     The State Defendants admit that some or all of the cited statutes provide for  
18 venue in Thurston County.

19          3.4     The State Defendants deny the allegations in this paragraph.

20                   **ANSWER TO FACTUAL ALLEGATIONS**

21          4.1     The State Defendants admit only that the Tribe is a successor to a tribe that  
22 signed the Treaty of Point No Point and that the Tribe traditionally lived in the Port Angeles  
23 area, including the current waterfront area, and that the Tribe does not own a casino. The State  
24 Defendants lack knowledge sufficient to form a belief regarding the truth of the remaining  
25 allegations, which are merely rhetorical, and therefore deny those allegations.



1           4.2     The State Defendants admit only that construction activity on the site disturbed  
2 a portion of a historical site and a burial ground, some of which may have been previously  
3 disturbed by a 1920s era industrial development. The State Defendants lack knowledge  
4 sufficient to form a belief regarding the truth of the remaining allegations in this paragraph and  
5 therefore deny those allegations.

6           4.3     The State Defendants admit only that certain written materials refer generally to  
7 Tse-whit-zen and associated burial grounds but lack sufficient detail to determine its precise  
8 location. As required under the National Historic Preservation Act of 1966, during the site  
9 reassessment process that followed the initial discovery, WSHS determined that the site was  
10 eligible for listing on the National Register of Historic Places. The WSDOT endorsed that  
11 determination and the SHPO concurred that the site was eligible. The site contains a  
12 significant amount of historical and cultural resources. The State Defendants lack knowledge  
13 sufficient to form a belief regarding the truth of the remaining allegations in this paragraph and  
14 therefore deny those allegations.

15          4.4     The State Defendants admit only that in November 2002, the Project site was  
16 under consideration as a potential location for the graving yard. The site was purchased after  
17 completion of the §106 process. The State Defendants deny all allegations not specifically  
18 admitted.

19          4.5     The State Defendants admit only that the Project required various excavations at  
20 the approximate depths noted in this paragraph. The State Defendants deny all allegations not  
21 specifically admitted.

22          4.6     The State Defendants admit only that as part of the §106 process, WSDOT  
23 ordered a cultural resources assessment that would address the §106 requirements and would  
24 inform WSDOT and other responsible agencies about the Project's effects on any historical  
25 properties resources likely to be encountered during Project construction activities. The State  
26 Defendants deny all allegations not specifically admitted.

1           4.7     The State Defendants admit only that after reviewing the cultural resources  
2 survey report, the Tribe wrote a letter on February 5, 2003, that speaks for itself. The State  
3 Defendants deny all allegations not specifically admitted.

4           4.8     The State Defendants deny the allegations in this paragraph.

5           4.9     The State Defendants admit only that on August 16, 2003, WSDOT's  
6 construction contractor uncovered evidence of shell midden during excavations for the Project.  
7 The WSDOT assistant project engineer identified the material and ordered the contractor to  
8 move away from the area of discovery. WSDOT immediately contacted the Tribe, WSHS,  
9 SHPO, and the appropriate federal agencies as required by federal law and the approved  
10 monitoring plan. WSDOT immediately implemented the monitoring protocols developed by  
11 WSHS and approved by the Tribe. All discoveries of archaeological material in August 2003  
12 were unintentional. The State Defendants deny all allegations not specifically admitted.

13          4.10    The State Defendants admit only that they immediately notified the Tribe about  
14 the discovery and that all subsequent construction proceeded according to the monitoring plan  
15 previously reviewed by all parties, including the Tribe. The State Defendants deny all  
16 allegations not specifically admitted.

17          4.11    The State Defendants admit only that WSDOT contractors excavated some  
18 material from shallow areas that WSHS had determined (and the Tribe concurred) was unlikely  
19 to contain archaeological material. Some of this material was stored on the Project site; the  
20 remainder was transported to a nearby facility and properly stored. Based on information  
21 currently available to the State Defendants, they lack knowledge sufficient to form a belief  
22 about whether the material located at the Shotwell facility contains human remains or funerary  
23 items. The State Defendants deny all allegations not specifically admitted.

24          4.12    The State Defendants admit only that WSDOT terminated construction activity  
25 at the site shortly after the initial discovery and conducted costly and time-consuming  
26 investigation of the archaeological resources. At all times, WSDOT worked with the

1 appropriate tribal, state, and federal authorities. In March 2004, the State Defendants, the  
2 Tribe, FHWA, and the U.S. Army Corps of Engineers executed the MOA under the National  
3 Historic Preservation Act of 1966, which included the Site Treatment Plan designed to provide  
4 for archaeological investigation of the site in accordance with §106. Even though neither  
5 federal nor state law required the Tribe to be signatory to the MOA because the site was not on  
6 tribal land, FHWA, with the State Defendants concurring, invited the Tribe to sign the MOA,  
7 which it did. The Site Treatment Plan was prepared by an archaeologist the Tribe had selected  
8 and that had represented tribal interests since the original discovery in August 2003. The State  
9 Defendants deny all allegations not specifically admitted.

10 4.13 The State Defendants admit only that the Tribe negotiated and bargained for a  
11 substantial sum of money to “mitigate” the site disturbance and that the Tribe and WSDOT  
12 ultimately negotiated the Settlement Agreement and Release in which the State paid the Tribe  
13 more than \$3.4 million and the Tribe promised to completely release and forever discharge the  
14 State from any and all claims, demands, and causes of action, and covenanted to never sue the  
15 State for past or future activities at the Project site. The Settlement Agreement and Release  
16 resolved all non-§106 issues between WSDOT and the Tribe. The State Defendants deny all  
17 allegations not specifically admitted.

18 4.14 The State Defendants admit only that WSDOT and Tribe executed the  
19 Settlement Agreement and Release as described previously and that State Defendants have  
20 complied with all obligations in that Agreement. The State Defendants admit that the  
21 Settlement Agreement and Release references the MOA and Site Treatment Plan but deny all  
22 remaining allegations in this paragraph.

23 4.15 The State Defendants admit only that WSDOT contractors resumed  
24 construction activities pursuant to MOA and the Site Treatment Plan. Neither the post-  
25 discovery site reassessment nor the Site Treatment Plan contemplated the scope of the burial  
26 ground or other historical resources that were eventually uncovered. The State Defendants

1 reasonably relied upon those documents and upon the Tribe's approval of the documents and  
2 included plans whenever it decided to proceed with or resume construction activity at the site.  
3 The State Defendants also admit that the discoveries made at the site have proved to be  
4 archaeologically significant, but the State Defendants deny that the extent of the burial ground  
5 was evident or expected when construction resumed in April 2004 pursuant to the agreed-upon  
6 Site Treatment Plan. The State Defendants deny all allegations not specifically admitted in this  
7 paragraph.

8         4.16 The State Defendants admit only that numerous intact, or partially intact, sets of  
9 human remains and numerous skeletal isolates were uncovered at the site pursuant to the  
10 agreed-upon Site Treatment Plan developed by the Tribe's chosen archaeologist. Several other  
11 human remains were uncovered outside the Project area due to the Tribe's insistence that  
12 WSDOT excavate beyond the Project boundaries to locate and recover additional remains.  
13 The State Defendants deny all allegations not specifically admitted.

14         4.17 The State Defendants admit only that the Tribe asked WSDOT to stop  
15 construction in the vicinity of the uncovered burials, but the State Defendants deny that the  
16 Tribe asked that the Project be stopped at that time. The State Defendants complied with the  
17 Tribe's request. WSDOT paid the Tribe to provide supervision and labor for the recovery of  
18 human remains from the site and that all human remains recovery was conducted pursuant to  
19 the agreed Site Treatment Plan or other protocols in effect at the time of discovery. The Tribe  
20 knew when it agreed to continuance of the construction activity that heavy equipment was  
21 required for the excavations and that appropriate safeguards were in place to protect uncovered  
22 human remains and tribal workers. The State Defendants deny all allegations not specifically  
23 admitted.

24         4.18 The State Defendants admit only that in December 2004 the State stopped the  
25 Project consistent with the Tribe's wishes, upon receiving a formal request from the Tribe to  
26 do so. The State Defendants deny all allegations not specifically admitted in this paragraph.

1           4.19   The State Defendants admit only that as required by §106 and the MOA, they  
2 have negotiated at length with the Tribe and various federal entities to resolve outstanding  
3 issues related to the reinterment of human remains and the use of the site for future  
4 construction activities. The State Defendants deny all allegations not specifically admitted.

5           4.20   The State Defendants admit only that they have been unable to negotiate a  
6 resolution to the outstanding issues related to the site and reburial activities. The State  
7 Defendants have complied with all applicable legal requirements regarding the site and the  
8 reburial activities. Any disputes regarding compliance with the MOA should be subject to the  
9 disputes resolution provision of that document. The State Defendants deny all allegations not  
10 specifically admitted and deny all allegations of wrongdoing in this paragraph.

11           4.21   The State Defendants acknowledge that the events that have occurred at the site  
12 have been significant for all persons involved. The State Defendants deny all allegations of  
13 wrongful acts or failures to act, deny that any tribal property has been damaged and deny that  
14 they have caused or are legally responsible for any damage to the Plaintiffs.

15                           **ANSWER TO CLASS ACTION ALLEGATIONS**

16           5.1    The State Defendants admit only that the named Plaintiffs claim to speak for the  
17 Lower Elwha Klallam Tribe and seek to establish themselves as legal representatives of the  
18 Lower Elwha Klallam Tribal members. The State Defendants deny all allegations not  
19 specifically admitted.

20           5.2    The State Defendants deny the allegations in this paragraph.

21           5.3    The State Defendants lack knowledge sufficient to form a belief regarding the  
22 truth of these allegations and therefore deny the allegations.

23           5.4    The State Defendants deny the allegations in this paragraph.

24           5.5    The State Defendants deny the allegations in this paragraph.

25           5.6    The State Defendants deny the allegations in this paragraph.

1                                   **ANSWER TO FIRST CAUSE OF ACTION**

2           6.1    The State Defendants incorporate their responses to the allegations in  
3 paragraphs 1.1 through 5.6 as though fully set forth here.

4           6.2    The State Defendants admit only that the MOA and the Site Treatment Plan  
5 prescribe the parties' obligations and the contents of the documents speak for themselves. The  
6 State Defendants deny any allegations that are inconsistent or contrary to these documents.

7           6.3    The State Defendants deny the allegations in this paragraph.

8                                   **ANSWER TO SECOND CAUSE OF ACTION**

9           7.1    The State Defendants incorporate their responses to the allegations in  
10 paragraphs 1.1 through 6.3 as if fully set forth here.

11          7.2    This alleged "cause of action" is more properly characterized as a remedy,  
12 which appears to be based upon allegations that are inconsistent with those in the preceding  
13 "cause of action." To the extent that an answer is deemed necessary, the State Defendants  
14 deny the allegations in this paragraph.

15                                  **ANSWER TO THIRD CAUSE OF ACTION**

16          8.1    The State Defendants incorporate their responses to the allegations in  
17 paragraphs 1.1 through 7.2 as if fully set forth here.

18          8.2    The State Defendants deny the allegations in this paragraph.

19          8.3    The State Defendants deny the allegations in this paragraph.

20          8.4    The State Defendants deny that the Plaintiffs are entitled to the remedies  
21 requested in this paragraph.

22                                  **ANSWER TO FOURTH CAUSE OF ACTION**

23          9.1    The State Defendants incorporate their responses to the allegations in  
24 paragraphs 1.1 through 8.4 as if fully set forth here.

25          9.2    This "cause of action" is really a request for a temporary remedy and the State  
26 Defendants deny that the Plaintiffs are entitled to such temporary relief.

1                                   **ANSWER TO FIFTH CAUSE OF ACTION**

2           10.1   The State Defendants incorporate their responses to the allegations in  
3 paragraphs 1.1 through 9.2 as if fully set forth here.

4           10.2   This allegation pertains to other defendants and should require no answer from  
5 the State Defendants. To the extent that an answer is deemed necessary, the State Defendants  
6 deny the allegation.

7           10.3   This allegation pertains to other defendants and requires no answer from the  
8 State Defendants. To the extent that an answer is deemed necessary, the State Defendants  
9 deny the allegation.

10          10.4   This allegation pertains to other defendants and requires no answer from the  
11 State Defendants. To the extent that an answer is deemed necessary, the State Defendants  
12 deny the allegation.

13                                   **ANSWER TO SIXTH CAUSE OF ACTION**

14          11.1   The State Defendants incorporate their responses to the allegations in  
15 paragraphs 1.1 through 10.4 as if fully set forth here.

16          11.2-11.3   These allegations pertain to another defendant and require no answer  
17 from the State Defendants. To the extent that an answer is deemed necessary, the State  
18 Defendants allege that WSDOT owns the material stored at the Shotwell facility after it  
19 purchased the material from Mr. Shotwell. WSDOT has paid for the cost of storing the  
20 material at the Shotwell facility. The State Defendants deny all allegations not specifically  
21 admitted.

22                                   **ANSWER TO SEVENTH CAUSE OF ACTION**

23          12.1   The State Defendants incorporate their responses to the allegations in  
24 paragraphs 1.1 through 11.3 as if fully set forth here.

25          12.2   The State Defendants admit they have entered into contractual agreements with  
26 the Tribe that provide for the human remains and funerary objects discovered at the site to be

1 transferred to the Tribe for appropriate reinterment. The State Defendants deny that the  
2 Plaintiffs have a property interest in the specified items and state that all such items have at all  
3 times been treated appropriately.

4 12.3 The State Defendants deny the allegations in this paragraph.

5 12.4 The State Defendants deny that the Plaintiffs are entitled to the relief requested.

6 **ANSWER TO EIGHTH CAUSE OF ACTION**

7 13.1 The State Defendants incorporate their responses to the allegations in  
8 paragraphs 1.1 through 12.4 as if fully set forth here.

9 13.2 The State Defendants deny the allegations in this paragraph.

10 13.3 The statutes referenced in this paragraph speak for themselves. The State  
11 Defendants deny that the referenced statutes apply to the site.

12 13.4 The State Defendants deny that the Plaintiffs are entitled to the relief requested.

13 **ANSWER TO NINTH CAUSE OF ACTION**

14 14.1 The State Defendants incorporate their responses to the allegations in  
15 paragraphs 1.1 through 13.4 as if fully set forth here.

16 14.2 The State Defendants admit only that all persons in this country have the right  
17 to be free from discrimination based on race and creed. The State Defendants deny all  
18 allegations not specifically admitted.

19 14.3 The State Defendants deny all allegations in this paragraph.

20 14.4 The State Defendants deny all allegations in this paragraph.

21 14.5-14.6 The State Defendants deny that the Plaintiffs are entitled to the relief  
22 requested in these paragraphs.

23 **ANSWER TO TENTH CAUSE OF ACTION**

24 15.1 The State Defendants incorporate their responses to the allegations in  
25 paragraphs 1.1 through 14.6 as if fully set forth here.



1           15.2-15.4     The allegations in these paragraphs pertain to other defendants and  
2 should require no answer from the State Defendants. To the extent that an answer is deemed  
3 necessary, the State Defendants deny the allegations

4                           **ANSWER TO ELEVENTH CAUSE OF ACTION**

5           16.1     The State Defendants incorporate their responses to the allegations in  
6 paragraphs 1.1 through 15.4 as if fully set forth here.

7           16.2-16.3     The allegations in these paragraphs pertain to other defendants and  
8 should require no answer from the State Defendants. To the extent that an answer is deemed  
9 necessary, the State Defendants deny the allegations.

10                           **ANSWER TO TWELFTH CAUSE OF ACTION**

11           17.1     The State Defendants incorporate their responses to the allegations in  
12 paragraphs 1.1 through 16.3 as if fully set forth here.

13           17.2-17.3     The allegations in these paragraphs pertain to other defendants and  
14 should require no answer from the State Defendants. To the extent that an answer is deemed  
15 necessary, the State Defendants deny the allegations.

16           The State Defendants deny all allegations that were not specifically admitted.

17                           **ANSWER TO PLAINTIFFS' PRAYER**

18           The State Defendants deny that the Plaintiffs are entitled to any relief and ask that they  
19 take nothing by this complaint.

20                           **AFFIRMATIVE AND OTHER DEFENSES**

21           1.     Plaintiffs' injuries or damages, if any, were proximately caused by the fault of  
22 the Tribe itself and/or third parties including Dennis Sullivan, Frances Charles, John Does 1-  
23 100 (presently unknown tribal officials who developed the protocols and supervised the  
24 recovery and tribal workers who uncovered and handled the human remains) and independent  
25 contractors Western Shores Heritage Services, Inc., and Larson Anthropological and  
26

1 Archaeological Services, Ltd., which are the entities contractually responsible for the  
2 archaeological work and the recovery and treatment of any human remains.

3 2. To the extent that Plaintiffs allege or intend to allege any claim sounding in tort  
4 against the State Defendants, such claims are barred by their failure to follow the statutory  
5 claim filing requirements before filing this lawsuit.

6 3. Plaintiffs' tort claims, to the extent that such are alleged or will be alleged, are  
7 barred or should be reduced by their contributory negligence.

8 4. Plaintiffs' tort claims, to the extent that such are alleged or will be alleged, are  
9 barred by the public duty doctrine.

10 5. Plaintiffs' claims target a discretionary governmental act or actions for which  
11 the State Defendants cannot be liable.

12 6. Plaintiffs' claims are barred because they assumed the risk of harm.

13 7. Plaintiffs' claims are barred by accord and satisfaction.

14 8. Plaintiffs have failed to mitigate their alleged damages.

15 9. Plaintiffs' claims are barred by a valid release of liability and covenant not to  
16 sue that was knowingly and voluntarily agreed upon by the Tribe in the Settlement Agreement  
17 and Release.

18 10. Plaintiffs' contract claims are barred by their own material breach of contract  
19 and/or failure to perform a condition precedent to the State Defendants' performance.

20 11. In the event that the court determines that the State Defendants should be liable  
21 for additional mitigation or reburial costs, the State Defendants are entitled to a set-off of  
22 amounts previously paid to the Tribe pursuant to the Settlement Agreement and Release and  
23 ask the court to place those funds in a constructive trust and to order an accounting of those  
24 funds.

25 12. Plaintiffs failed to join an indispensable party, the Federal Highway  
26 Administration, which is the lead federal agency responsible for the federal undertaking and is

1 a party to the Memorandum of Agreement and therefore needed for a just and complete  
2 adjudication of the claims asserted in this complaint. If the FHWA is not made a party to this  
3 suit, the State Defendants face the risk of inconsistent obligations or liabilities pertaining to the  
4 site.

5 13. Plaintiffs' claims are barred by their failure to exhaust federal administrative  
6 remedies as required by the MOA and/or by the doctrine of primary jurisdiction. Plaintiffs'  
7 claims are not ripe for review until the FHWA rules on the disputes that have arisen in regard  
8 to the federal undertaking. Alternatively, if the court deems the federal administrative process  
9 complete, some of the Plaintiffs' claims are barred by the doctrine of collateral estoppel and/or  
10 res judicata.

11 14. Plaintiffs' claims are barred by promissory estoppel or another form of estoppel  
12 and/or waiver.

13 15. Plaintiffs' damage claims based upon Chapter 27.44 RCW are barred by the  
14 State Defendants' sovereign immunity from suit.

15 16. Some of Plaintiffs' claims may be barred by the applicable statute of  
16 limitations.

17 17. The individual plaintiffs and putative class action representatives lack standing  
18 to assert the claims.

19 18. Plaintiffs' complaint fails to state a claim upon which relief can be granted.

20 **II. COUNTERCLAIMS AGAINST LOWER ELWHA KLALLAM TRIBE AND**  
21 **THIRD PARTY CLAIMS AGAINST TRIBAL CHAIR FRANCES CHARLES,**  
22 **IN HER OFFICIAL CAPACITY, AND JOHN DOES 1-100 (PRESENTLY**  
**UNKNOWN TRIBAL OFFICIALS AND TRIBAL MEMBERS)**

23 **PARTIES**

24 1.1 Counter-Claimants and Third-Party Plaintiffs Washington State Department of  
25 Transportation ("WSDOT") and the Department of Archaeological and Historical  
26 Preservation ("DAHP") (collectively, the "State") are state agencies.

1 1.2 Counter-Defendant Lower Elwha Klallam Tribe ("LEKT" or the "Tribe"), also  
2 known as the Lower Elwha Tribal Community, is a federally-recognized Indian Tribe. The  
3 Tribe acts through a chairperson selected by the tribal council.

4 1.3 Dennis Sullivan was the Chair of the LEKT when WSDOT first consulted  
5 LEKT within the §106 process, and continued to hold this position until sometime in the  
6 summer of 2004.

7 1.4 Third-Party Defendant Frances Charles replaced Dennis Sullivan as Chair in  
8 the summer of 2004 and currently holds this position.

9 1.5 Third-Party Defendants John Does 1-100 are presently unidentified tribal  
10 officials and tribal members who participated in the archaeological survey work or the  
11 recovery activities of the Project site.

## 12 JURISDICTION AND VENUE

13 2.1 If this court exercises jurisdiction over the claims asserted by the Plaintiffs  
14 against the State, it has jurisdiction over all of the claims asserted by the State below.

15 2.2 If venue for the Plaintiffs' claims properly resides in Thurston County Superior  
16 Court then, Thurston County is a proper venue for the State's counter- and third-party claims.

## 17 III. CLAIMS AGAINST THE TRIBE, FRANCES CHARLES IN HER OFFICIAL 18 CAPACITY, AND JOHN DOES 1-100 (PRESENTLY UNKNOWN TRIBAL 19 OFFICIALS AND TRIBAL MEMBERS)

### 20 FACTUAL ALLEGATIONS

21 3.1 The State incorporates the admissions and allegations set forth in the State  
22 Defendants' answer as though fully set forth here.

#### 23 A. FIRST CAUSE OF ACTION: NEGLIGENCE [AGAINST CHAIRWOMAN 24 CHARLES, THE TRIBE, AND JOHN DOES 1-100 (PRESENTLY UNKNOWN 25 TRIBAL OFFICIALS AND TRIBAL MEMBERS)]

26 4.1 The State incorporates the allegations set forth in paragraphs 1.1 through 3.1 as  
though fully set forth herein.

1           4.2     In January 2003, WSDOT requested comments from the Tribe on the Cultural  
2 Resources Survey, which evaluated the potential effects that the Project would have on the  
3 Tribe's cultural and historical resources. The Tribe and its Chair, Dennis Sullivan, had a duty  
4 to use reasonable care in evaluating and commenting upon the Survey. The Tribe breached  
5 this duty by, among other things, failing to consult with its elders, whom the Tribe was  
6 uniquely qualified to identify, failing to disclose the "oral historic" record, and by failing to  
7 disclose its limited investigation. If, as the Plaintiffs now allege, the "oral historic" record  
8 would have identified the location and nature of the village underlying the project site and the  
9 number of human remains that would be affected, WSDOT would not have selected the site  
10 for the Project.

11           4.3     In April 2003, WSDOT requested comments from the Tribe on the  
12 Archaeological Monitoring Plan. That document outlined: 1) the procedures for  
13 archaeological monitoring of construction activities; 2) the procedures for reporting of  
14 discoveries of cultural resources and human remains; and 3) the procedures and protocols for  
15 the treatment of unanticipated cultural resources and human remains. The Tribe, through its  
16 Chair, Dennis Sullivan, had a duty to use reasonable care in evaluating the protocols set forth  
17 in the Monitoring Plan. The WSDOT complied with those protocols and relied on the  
18 prescribed procedures to protect tribal interests. If, as the Plaintiffs now allege, the August  
19 2003 discoveries were handled improperly, the Tribe breached its duty of reasonable care by  
20 failing to consult with tribal elders and otherwise generally failing to ensure that the  
21 prescribed protocols adequately protected tribal members' interests.

22           4.4     Subsequent to the initial archaeological discoveries in August 2003, the Tribe  
23 and its archaeologist, LAAS, worked jointly with WSDOT and WSHS to develop the  
24 Archaeological Site Assessment Plan. The Tribe's role in the creation of this plan included  
25 collecting information from tribal elders and other knowledgeable individuals as well as the  
26 development of protocols for the recovery of human remains and artifacts that would protect

1 tribal interests. The Tribe had a duty to use reasonable care in the development of the  
2 Archaeological Site Assessment Plan. If, as the Plaintiffs now allege, that Plan unreasonably  
3 failed to anticipate the scope of human remains and artifacts underlying the site and the  
4 prescribed protocols failed to protect tribal members' emotional, spiritual, cultural, and  
5 religious values, the Tribe breached its duty of reasonable care.

6 4.5 The Tribe and WSDOT prepared an Archaeological Testing and Monitoring  
7 Plan for Bioswales and Drainage in November 2003. The Tribe had a duty to use reasonable  
8 care to identify and communicate to the WSDOT, appropriate protocols and procedures to  
9 mitigate impacts associated with the bioswales and drainage features and to protect tribal  
10 interests. The State complied with those protocols and relied on the prescribed procedures to  
11 protect tribal interests. If, as the Plaintiffs now allege, this Plan unreasonably failed to  
12 anticipate the likely Project effects and unreasonably failed to protect tribal members'  
13 interests, the Tribe breached its duty.

14 4.6 The Tribe participated in the development of the Treatment and Monitoring  
15 Plans For the Tse-whit-zen Site (45CA523) and Shotwell Recycling Property Recovery ("Site  
16 Treatment Plan"), which was finalized in March 2004. The Tribe's role in the development of  
17 this plan included investigating the likelihood of encountering additional cultural resources  
18 and human remains upon reinitiating the graving dock construction project and ensuring that  
19 the Plan prescribed protocols that would protect tribal members' spiritual, cultural, religious,  
20 and emotional interests. The State relied on the Site Treatment Plan when it decided to  
21 proceed with the Project. The State complied with the prescribed protocols and relied on the  
22 prescribed procedures to protect tribal interests. If, as the Plaintiffs now allege, the Site  
23 Treatment Plan unreasonably failed to anticipate the likely Project effects and unreasonably  
24 failed to protect tribal members' interests, the Tribe breached its duty.

25 4.7 The Tribe, its supervisors, and its member-workers participated intimately in  
26 the implementation of the Site Treatment Plan, working side-by-side with and for

1 archaeologists in the recovery of cultural resources and human remains at the Project site.  
2 The Tribe and tribal supervisors had a duty to use reasonable care in providing competent  
3 staff, and to train and supervise those staff to ensure compliance with the Plan and prescribed  
4 protocols. In general, the Tribe, tribal supervisors, and tribal workers had a duty to use  
5 reasonable care to implement the Site Treatment Plan. If Plaintiffs' allegations are proven,  
6 the Tribe breached one or all of these duties.

7 4.8 The Tribe's multiple breaches of its duty of reasonable care are the proximate  
8 cause of WSDOT's unintentional discovery and disturbance of cultural resources and human  
9 remains within the project area. The Tribe's breaches are also the proximate cause of any  
10 alleged damage or injury suffered by the Plaintiffs.

11 4.9 As a direct result of the unanticipated discovery of cultural resources and  
12 human remains and the impact of that discovery on the Project, WSDOT was forced to incur  
13 costs for archaeological recovery and curation of cultural artifacts and human remains.  
14 Ultimately, WSDOT was forced to significantly modify the Project. In addition to the  
15 archaeological costs, WSDOT has incurred and will continue to incur damages as a result of  
16 the Tribe's negligence including the costs associated with the purchase of the property for the  
17 Project, construction costs, site closure costs, the search for a new location and increased  
18 engineering, permitting, design, and construction costs caused by the Project relocation and  
19 the reduced timetable for pontoon construction, and any judgment that might be entered in  
20 favor of the Tribe or the individual plaintiffs.

21 **B. SECOND CAUSE OF ACTION: NEGLIGENT MISREPRESENTATION**  
22 **(AGAINST THE TRIBE)**

23 5.1 The State incorporates the allegations of paragraphs 1.1 through 4.9 as though  
24 fully set forth herein.

25 5.2 The Tribe was uniquely positioned as the repository of oral and ethnographic  
26 history to know the location of any ancestral villages, cemeteries, or other historic properties

1 in which it was interested, and to identify procedures to mitigate the emotional, cultural,  
2 spiritual, and religious impacts caused by project impacts on such properties. Following the  
3 initial discovery, on August 28, 2003, Chairman Sullivan was quoted in the Peninsula Daily  
4 News as saying: “[I]t was a tribal village, and it was documented – and everyone knew that it  
5 was a tribal village going into it.” On May 23, 2004, Frances Charles was quoted as saying  
6 that “I wish they [WSDOT] would have listened to the tribe and asked the tribe more  
7 questions rather than relying on scientific tests.” The same article reports that other tribal  
8 members were not surprised when human remains were discovered in August 2003. Due in  
9 part to the Tribe’s insistence that state-tribal interaction be handled on a government-to-  
10 government basis, the Tribe positioned itself as the only entity that could tap the knowledge of  
11 its elders regarding the location of historical properties or human remains as well as  
12 appropriate protocols for protecting the spiritual, cultural and religious interests of its  
13 members.

14       5.3     Beginning nearly a year before the initial discovery, WSDOT asked the Tribe  
15 to identify historical properties or cultural resources that would be affected by the Project, and  
16 to identify procedures for mitigating any Project effects. These information requests to the  
17 Tribe continued until construction at the Port Angeles site was terminated in December 2004.  
18 The Tribe knew or should have known that the State would rely on its concurrence with the  
19 conclusions of the Cultural Resources Survey, the June 2003 village location report, and the  
20 subsequent archaeological assessments when deciding whether to proceed with the Project.  
21 The Tribe knew or should have known that the State would rely on its affirmative  
22 representations that were reflected in the previously described plans, protocols, and  
23 procedures when determining the treatment of human remains and artifacts.

24       5.4     WSDOT was justified in relying upon the Tribe’s and Chairman Sullivan’s and  
25 Chairwoman Charles’ multiple misrepresentations (including those professing satisfaction  
26 with the protocols and WSDOT compliance, statements that the Tribe wanted the Project to



1 go forward and requests to expand the burial recovery area previously described in the  
2 answer) regarding the potential impact that the graving dock construction project would have  
3 on the Tribe's cultural resources and ancestral human remains.

4 5.5 If the statements referenced in paragraph 5.2 are true, the Tribe failed to use  
5 reasonable care to obtain and communicate accurate information regarding the location of  
6 historical properties and human remains. If the Plaintiffs' allegations regarding the treatment  
7 of the historical properties and human remains are true, the Tribe failed to use reasonable care  
8 to obtain and communicate accurate information regarding cultural, spiritual, and other  
9 interests of its members.

10 5.6 The Tribe had a pecuniary interest in obtaining subcontracts, employment for  
11 tribal members, and mitigation funds from the Project.

12 5.7 As a direct result of the Tribe's negligent representations, WSDOT suffered  
13 damages by incurring the costs described in paragraph 4.9.

14 **C. THIRD CAUSE OF ACTION: BREACH OF CONTRACT – SETTLEMENT**  
15 **AGREEMENT AND RELEASE (AGAINST CHAIRWOMAN CHARLES AND**  
16 **THE TRIBE)**

17 6.1 The State incorporates the allegations of paragraphs 1.1 through 5.7 as though  
18 fully set forth herein.

19 6.2 On March 16, 2004, the Tribe, through its Chair, Dennis R. Sullivan, entered  
20 into a contract titled "Settlement Agreement and Release" with WSDOT.

21 6.3 The parties negotiated and bargained for a contract that would compromise and  
22 settle all claims between them for damages or equitable relief which had occurred or would  
23 occur as a result of excavation and construction activity at the Project site and any costs  
24 associated with the reburial of uncovered human remains including the costs of purchasing  
25 property for a burial site.

26 6.4 The WSDOT promised to pay the Tribe \$3,437,000.00. In return, the Tribe  
covenanted that it would never, individually or as a Tribe, institute any action at law or in

1 equity against the State, state agents, or state contractors (with the exception of Western  
2 Shores Heritage Services) on account of any damage, loss, or injury sustained as a  
3 consequence of the graving dock construction project. Further, the Tribe agreed that this  
4 covenant would be a complete defense to any action brought by the Tribe, its heirs, legal  
5 representatives, devisees or assigns.

6 6.5 The Tribe and Chairwoman Frances Charles authorized attorneys to file suit on  
7 its behalf against state agencies, state officers, and state contractors on account of damages,  
8 losses, and/or injuries sustained as a consequence of the Project. Upon information and belief,  
9 the Tribe and currently unidentified tribal officers, along with others, developed a "class  
10 action" scheme in an effort to avoid the consequences of the Settlement Agreement and  
11 Release.

12 6.6 By authorizing the filing of this suit, Tribal Chair Frances Charles and the  
13 Tribe breached the covenant not to sue contained in the Settlement Agreement and Release.

14 6.7 As a direct result of this breach, the State has incurred and will continue to  
15 incur significant costs associated with its defense including, but not limited to, agency staff  
16 costs, attorneys' fees, expert witness fees, and other litigation costs.

17 **D. FOURTH CAUSE OF ACTION: BREACH OF CONTRACT – MOA (AGAINST**  
18 **THE TRIBE)**

19 7.1 The State incorporates the allegations set forth in the answer in paragraphs 1.1  
20 through 6.7 as though fully set forth herein.

21 7.2 As set forth previously, the State contends that this court lacks jurisdiction over  
22 all claims covered by the Memorandum of Agreement ("MOA"). This counterclaim is plead  
23 in the alternative if the court determines that it has jurisdiction over claims covered by the  
24 MOA and that such claims are ripe for review. The Tribe signed the MOA on March 16,  
25 2004. The MOA is a binding contract between the signatory parties. The MOA outlines §106  
26 mitigation requirements and incorporates the Site Treatment Plan. Under the MOA, members

1 of the Tribe were to implement the Site Treatment Plan and WSDOT was to reimburse the  
2 Tribe for costs associated with this task. The Site Treatment Plan delineates protocols for the  
3 recovery of human remains which were to be followed by the Tribe and its workers.

4 7.3 To the extent that the Plaintiffs prove failures to comply with these protocols,  
5 the Tribe has breached the contract and caused the State to incur damages including increased  
6 archaeological costs, increased Project construction costs and the costs of defending this  
7 lawsuit and paying any judgment.

8 7.4 By signing the MOA, the Tribe promised that the stipulated mitigation  
9 measures constituted full compliance with §106 and the Project could go forward with the  
10 prescribed mitigation measures in place. The Tribe breached the contract by subsequently  
11 demanding additional excavation and recovery of human remains beyond the area affected by  
12 the Project as additional mitigation measures. Ultimately the Tribe breached the MOA by  
13 demanding that the Project cease although the other signatory parties had fully performed  
14 their obligations. The State suffered damages as a result of that breach as described in  
15 paragraph 4.9.

16 **E. FIFTH CAUSE OF ACTION: BREACH OF CONTRACTUAL DUTY OF GOOD**  
17 **FAITH AND FAIR DEALING (AGAINST THE TRIBE AND CHAIRWOMAN**  
18 **CHARLES)**

18 8.1 The State incorporates the allegations set forth in paragraphs 1.1 through 7.4 as  
19 though fully set forth herein.

20 8.2 In the MOA, the Tribe negotiated and agreed to specific measures that would  
21 mitigate the adverse impacts of the Project on the Tribe's historical and cultural resources. If  
22 WSDOT complied with these mitigation measures, the Tribe agreed that it would consider  
23 WSDOT's obligations under §106 of the National Historic Preservation Act fulfilled.

24 8.3 In addition, the Tribe negotiated and agreed to a Settlement Agreement and  
25 Release under which it received \$3.437 MM as mitigation compensation above that required  
26 under the MOA.

1           8.4     Under the MOA, the Tribe had an implied duty to act in good faith and deal  
2 fairly in its assessment of WSDOT's efforts to provide all mitigation measures required by the  
3 MOA.

4           8.5     Up until the time the Project was terminated, WSDOT had performed the  
5 mitigation measures prescribed by the MOA. The Tribe, however, made numerous additional  
6 and unreasonable demands upon WSDOT, including a demand that WSDOT expand the  
7 recovery of human remains beyond the Project area and the demands for mitigation measures  
8 beyond that required by the MOA. These demands ultimately led to an impasse in the  
9 negotiations and a termination of the Project. In doing so, the Tribe breached its implied duty  
10 of good faith and fair dealing.

11          8.6     The WSDOT attempted to address the Tribe's new demands through  
12 negotiation but was unsuccessful.

13          8.7     As a direct result of the Tribe's breach of its duty of good faith and fair  
14 dealing, WSDOT was forced to terminate the Project after spending millions of dollars on  
15 planning, permitting, engineering, design, and construction and the mitigation measures  
16 required the MOA and the Settlement Agreement and Release. Further, WSDOT will  
17 continue to incur millions of dollars in costs associated with the Project closure and redesign,  
18 the search for a new location, and the shortened timetable for the pontoon construction  
19 project.

20 **F.     SIXTH CAUSE OF ACTION: CONTRIBUTION (AGAINST THE TRIBE)**

21          9.1     The State incorporates the allegations set forth in paragraphs 1.1 through 8.7 as  
22 though fully set forth herein.

23          9.2     WSDOT entered into an agreement with the Tribe's consultant, Larson  
24 Anthropological and Archaeological Services ("LAAS"), which in turn subcontracted with the  
25 Tribe. The WSDOT agreed to reimburse LAAS for the costs associated with the subcontract.  
26 In its capacity as an independent contractor with LAAS, the Tribe performed archaeological

1 work under the Site Treatment Plan. The Tribe had a duty to provide competent workers and  
2 to supervise those workers to ensure that they complied with the specified protocols and  
3 procedures.

4 9.3 In the event that the State Defendants are found jointly and severally liable for  
5 negligence or negligent infliction of emotional distress due to a failure to exercise reasonable  
6 care to avoid disturbing and/or destroying graves and the infliction of emotional distress  
7 during the implementation of the Site Treatment Plan, the State is entitled to contribution from  
8 the Tribe in the amount of the Tribe's proportional fault.

### 9 III. RELIEF REQUESTED

10 The State requests the following relief:

11 1. Dismissal of the Plaintiffs' complaint with prejudice or, in the alternative, that  
12 this litigation be stayed until the Federal Highway Administration rules on the parties' disputes  
13 as required by §106 and the Memorandum of Agreement.

14 2. Damages in an amount to be proven at trial.

15 3. Attorneys' fees and costs incurred by the State as a result of the breach of the  
16 covenant not to sue under the Settlement Agreement and Release.

17 4. Attorneys' fees and costs as may be recoverable under RCW 27.44.050(4),  
18 RCW 4.84.185, CR 11, and other applicable law.

19 5. Entry of an order requiring the Tribe and Chairperson Charles to specifically  
20 perform their obligations under the Settlement Agreement and Release, including the covenant  
21 not to sue, and prohibiting the Tribe, Chairwoman Charles, or any other tribal officers from  
22 assisting or encouraging the filing of similar suits by other tribal members.

23 6. If it is found that the individual members of the Lower Elwha Klallam Tribe are  
24 not bound by the covenant not to sue within the Settlement Agreement and Release, the State  
25 requests that the court award equitable subrogation and allow the State to assert claims that the  
26 individuals could have brought against the Lower Elwha Klallam Tribe.

1           7.     If the court decides that the individual members of the Lower Elwha Klallam  
2 Tribe are not bound by the covenant not to sue within the Settlement Agreement and Release,  
3 the State requests that the court award a set-off of amounts previously paid to the Tribe under  
4 the Settlement Agreement and Release, place such funds in a constructive trust and order an  
5 accounting of those funds.


6           8.     Prejudgment interest.

7           9.     For leave to amend this answer to add additional defenses or claims that may be  
8 identified as discovery progresses.

9           10.    Such other relief as the court deems just and equitable.

10          **DATED** this 30<sup>th</sup> day of September, 2005.

11                               ROB MCKENNA  
12                               Attorney General

13                                 
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20                               Washington State Department of Transportation  
21                               and Douglas B. MacDonald, Secretary of the  
22                               Washington State Department of Transportation,  
23                               Washington State Department of Archaeology  
24                               and Historic Preservation, and Allyson Brooks,  
25                               State Historic Preservation Officer and Director of  
26                               the Department of Archeology and Historic  
                                  Preservation